

**United States Department of Labor
Employees' Compensation Appeals Board**

E.S., Appellant

and

**U.S. POSTAL SERVICE, SOUTH SUBURBAN
PROCESSING & DISTRIBUTION CENTER,
Bedford Park, IL, Employer**

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**Docket No. 12-1539
Issued: December 3, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 9, 2012 appellant filed a timely appeal of a February 2, 2012 schedule award decision of the Office of Workers' Compensation Programs (OWCP) and a June 28, 2012 decision finding that he abandoned his request for an oral hearing. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than one percent permanent impairment of his right leg for which he received a schedule award; and (2) whether OWCP's Branch of Hearings and Review properly found that he abandoned his request for an oral hearing.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 19, 2009 appellant, then a 52-year-old machine operator, filed a traumatic injury claim alleging that he developed low back pain due to repetitive movement and lifting trays weighing over 30 pounds. He provided his address in Chicago, Illinois. OWCP accepted this claim on March 31, 2009 for sprain of the lumbar spine.

Appellant underwent a nerve conduction study (NCS) on May 4, 2009 which did not demonstrate any signs of radiculopathy. He accepted a light-duty position on April 2, 2009. On January 7, 2010 OWCP accepted an aggravation of disc disease at T12 and L1-5. Appellant stopped work on July 23, 2010 due to the National Reassessment Process (NRP).

Appellant requested a schedule award on November 25, 2010. In an undated report, Dr. Jorge Hinojosa, a Board-certified otolaryngologist, stated that appellant had reached maximum medical improvement and had returned to work with no restrictions. He stated that appellant had no specific complaints.

In a letter dated June 1, 2011, OWCP requested additional medical evidence in support of his request for a schedule award. On May 25, 2011 appellant underwent an electromyogram (EMG) and NCS which were normal. On May 25, 2011 Dr. Amish Patel, a Board-certified neurologist, found normal strength through the lower extremities with the exception of the extensor hallucis longus (EHL) which was 4+/5 pm the right. He found that appellant's sensation to light touch was intact throughout the bilateral lower extremities and that his reflexes were symmetrical on the bilateral lower extremities. Dr. Patel opined that appellant had some signs of neuropathy and or radiculopathy in the lower extremities.

In a June 20, 2011 report, Dr. Joseph R. Mejia, a physician Board-certified in physical medicine and rehabilitation, described appellant's history of injury. He reviewed a magnetic resonance imaging (MRI) scan dated September 21, 2010 which demonstrated multilevel degenerative disc disease L1-S1. Dr. Mejia found that appellant demonstrated decreased range of motion in the lumbar spine, but was neurologically intact. He demonstrated constant right leg and lateral paresthesias to light touch. Dr. Mejia applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.² He used Table 16-12, sciatic peripheral nerve impairment, to find a net adjustment value of 2 and class 1 grade E lower extremity impairment of nine percent. Dr. Mejia included appellant's pain disability questionnaire.

Appellant underwent an MRI scan dated May 24, 2011 which demonstrated lumbar spondylosis, mild bilateral foraminal stenosis at L4-5 and L5-S1.

² A.M.A., *Guides* (6th ed. 2009).

OWCP's medical adviser reviewed the medical evidence on October 23, 2011 and noted appellant's symptoms of back pain radiating to his right lower extremity. He noted that appellant had loss of strength in his EHL only. The medical adviser stated:

"Using the lower extremity peripheral nerve impairment table (16-12) on page 535, this claimant more accurately has a class 1 common peroneal nerve impairment. This carries a [three] percent default grade C rating. Using the net adjustment formula, the normal gait gives the claimant a grade modifier 0 for functional status, the weakness in EHL gives [appellant] a grade modifier 1 for physical exam[ination] and the normal EMG gives him a grade modifier 0 for clinical studies. This makes his net adjustment -2, which moves him to a grade A, which carries a 1 percent lower extremity impairment.

"This rating differs from Dr. Mejia's, in that he has rated appellant for a sciatic nerve impairment; however, the neurologist's finding of weakness in the EHL would point to a peroneal nerve impairment instead. Further, he does not state what specific criteria he has for awarding the grade modifiers he did when applying the Net Adjustment Formula."

By decision dated February 2, 2012, OWCP granted appellant a schedule award for one percent impairment of his right lower extremity.

On February 7, 2012 appellant requested an oral hearing before an OWCP hearing representative. In an April 25, 2012 letter, OWCP's Branch of Hearings and Review advised appellant that his oral hearing was scheduled for June 4, 2012 at 3:45 p.m. local time at U.S. Department of Labor, 230 S. Dearborn Street, Room 818, Chicago, Illinois 60604. This notice was mailed to appellant's address of record as listed on the claim form.

In a decision dated June 28, 2012, the Branch of Hearings and Review found that appellant failed to appear for the scheduled oral hearing. There was no evidence of record that he contacted the Branch of Hearings and Review prior to or subsequent to the scheduled hearing to explain his failure to appear. The Branch of Hearings and Review found that appellant had abandoned his request for an oral hearing.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA³ and its implementing regulations⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of

³ 5 U.S.C. §§ 8101-8193, 8107.

⁴ 20 C.F.R. § 10.404.

tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁵

FECA does not authorize the payment of schedule awards for the permanent impairment of the whole person.⁶ Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.⁷ Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,⁸ no claimant is entitled to such an award.⁹

Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹⁰

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹¹ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in section 3.700 of its procedures.¹² Specifically, it will address lower extremity impairments originating in the spine

⁵ For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁶ *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975).

⁷ *W.D.*, *supra* note 6; *William Edwin Muir*, 27 ECAB 579 (1976).

⁸ FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

⁹ *W.D.*, *supra* note 6. *Timothy J. McGuire*, 34 ECAB 189 (1982).

¹⁰ *Id.* *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010) (Exhibits 1, 4).

through Table 16-11¹³ and upper extremity impairment originating in the spine through Table 15-14.¹⁴

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵

ANALYSIS -- ISSUE 1

Appellant submitted an impairment rating from Dr. Mejia which included physical findings of decreased range of motion in the lumbar spine and constant right leg and lateral paresthesias to light touch. Dr. Mejia stated that he was applying the sixth edition of the A.M.A., *Guides* and utilizing Table 16-12¹⁶ peripheral nerve impairment to determine appellant's rating. He determined that the implicated nerve was the sciatic nerve. Dr. Mejia then indicated that he was applying the formula, but did not offer any explanation of how he reached a net adjustment value of 2 for a class 1 grade E lower extremity impairment of nine percent.

OWCP's medical adviser reviewed the reports from Dr. Mejia and Dr. Patel. He noted that appellant had weakness of the EHL muscle and that this was enervated by the peroneal nerve. The medical adviser applied Table 16-12 and determined that a class 1 common peroneal nerve impairment was three percent default grade C rating.¹⁷ He then explained how he used the net adjustment formula including a grade modifier 0 under functional status as appellant had a normal gait, grade modifier 1 under physical examination due to weakness in EHL¹⁸ and grade modifier 0 in clinical studies due to appellant's normal EMG findings. In applying the formula, appellant has (0-1) + (1-1) + (0-1) or -2 net adjustment resulting in grade A, one percent lower extremity impairment.

It is well established that, when the attending physician fails to provide an estimate of impairment conforming to the A.M.A., *Guides* his opinion is of diminished probative value in establishing the degree of permanent impairment and OWCP may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the findings reported by the attending physician.¹⁹ The Board finds that Dr. Majia did not provide a correlation of his physical findings to the A.M.A., *Guides* and did not explain why the sciatic nerve was implicated. Due to these

¹³ A.M.A., *Guides*, 533 Table 16-11.

¹⁴ *Id.* at 425, Table 15-14.

¹⁵ *Id.* at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁶ *Id.* at 534, Table 16-12.

¹⁷ *Id.*

¹⁸ *Supra* note 14.

¹⁹ *Linda Beale*, 57 ECAB 429, 434 (2006).

deficiencies, the Board finds that OWCP properly relied on the findings of its medical adviser to determine the extent of appellant's permanent impairment for schedule award purposes.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA provides:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”²⁰

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.²¹

Section 10.622(f) of OWCP's regulation provide that a claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled.²² Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record. Where it has been determined that a claimant has abandoned his or her right to a hearing, OWCP will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.²³

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing and on April 25, 2012, OWCP's Branch of Hearings and Review advised appellant that his oral hearing was scheduled for June 4, 2012 at 3:45 p.m. local time at U.S. Department of Labor, 230 S. Dearborn Street, Room 818, Chicago, Illinois 60604. This notice was mailed to him at the same address he listed on the claim form located in Chicago, Illinois 60633. The record does not reflect that appellant requested postponement of the hearing prior to the scheduled date of the

²⁰ 5 U.S.C. § 8124(b)(1).

²¹ 20 C.F.R. § 10.616(a).

²² *Id.* at § 10.622(f).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearing and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

hearing. Appellant did not appear for the oral hearing. Neither did he provide any notification for the failure to appear within 10 days after the scheduled date of the hearing. Appellant's failure to provide any notification, together with his failure to appear at the scheduled hearing, constituted abandonment of his request for a hearing and the Board finds that OWCP properly so determined.

CONCLUSION

The Board finds that the weight of the medical evidence establishes that appellant has no more than one percent impairment of his right lower extremity for which he received a schedule award. The Board further finds that OWCP properly determined that appellant abandoned his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the June 28 and February 2, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 3, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board